

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	

To: Secretary, FCC
For: Chief, Consumer and Governmental Affairs Bureau

COMMENTS OF HAMILTON RELAY, INC.

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SUMMARY

Hamilton Relay, Inc. (“Hamilton”) appreciates the opportunity to comment on the June 8, 2018 *Further Notice of Proposed Rulemaking* (“*Further Notice*”), as the Commission continues to implement its statutory mandate under the Americans with Disabilities Act in the face of new technologies such as Internet Protocol Captioned Telephone Service (“IP CTS”). As explained in these comments, the Commission appears to have concluded that there is significant IP CTS misuse based on a very limited and anecdotal record, potentially misperceiving what is far more likely a legitimate growth in usage. Rather than taking the appropriate approach of targeting any specific instances of misuse, the Commission instead has chosen to impose arbitrary rate cuts and other proposals that affect the industry as a whole, and adversely affect service quality for users. Hamilton believes that the Commission must not underestimate the benefits that IP CTS has brought to numerous hard of hearing users, particularly the elderly, who would otherwise lack functionally equivalent communications service. At the same time, the Commission has proposed a number of rule revisions that Hamilton supports, as explained in these comments. Hamilton wants to ensure that all who need IP CTS have access to the service, and thus supports the Commission’s efforts to ensure the long-term viability and integrity of the TRS Fund.

With respect to rates, the Commission should adopt a permanent IP CTS compensation methodology that fosters both competition and service quality, while building the framework for a compensation methodology for Automatic Speech Recognition (“ASR”) once ASR becomes a viable substitute for Communications Assistant-based IP CTS. In lieu of arbitrary rate cuts, Hamilton proposes a price cap methodology grounded in an historical IP CTS rate, which Hamilton believes will fairly compensate providers for the reasonable cost of providing IP CTS, while providing stability in terms of future rates. Although Hamilton opposes a cost-based rate

methodology, to the extent that the Commission ultimately decides to adopt a cost-based approach, Hamilton believes that it must include costs authorized in Part 32 of the Commission's rules.

Whatever compensation methodology the Commission adopts for CA-based IP CTS, it must foster both competition and service quality while building the framework for a compensation methodology for ASR once ASR becomes a viable substitute for CA-based IP CTS. The Commission must seek further comment on ASR issues and modify existing rules to incorporate ASR before adopting an appropriate compensation method.

Finally, Hamilton believes that hearing health professionals are best positioned to determine the communications needs of hard of hearing individuals through an independent third party assessment approach. Hamilton supports the Commission's proposed rules in Appendix C of the *Further Notice*, with the modifications suggested in these comments.

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Hamilton Relay, Inc. (“Hamilton”), by its counsel, hereby submits these comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in the above-captioned proceeding regarding Internet Protocol Captioned Telephone Services (“IP CTS”).¹

As a provider of IP CTS nationwide to hard of hearing individuals who rely daily on this critical service, Hamilton supports the Commission’s efforts to improve IP CTS. In this regard, the Commission must ensure that it sufficiently compensates IP CTS providers and continues to focus on measures that directly benefit users of the service.

I. The Commission Must Use a Rate Compensation Methodology that Fosters Both Competition and Quality, Such as Price Cap

In light of the Commission’s interim decision to discontinue the use of the Multistate Average Rate Structure (“MARS”) methodology for the 2018-2020 fund years,² the Commission

¹ *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, CG Docket Nos. 13-24 & 03-123, FCC 18-79 (rel. June 8, 2018) (“*Report and Order*” or “*Further Notice*,” as appropriate).

² *Report and Order*, ¶ 26 (adopting interim IP CTS rates for fund years 2018-2019 and 2019-2020). Hamilton notes that Sprint Corporation (“Sprint”) filed a petition for reconsideration of the decision to abandon the MARS rate, and Hamilton fully supports Sprint’s petition. *See* (continued)...

must ensure that any alternative rate methodology adopted on a permanent basis sufficiently compensates IP CTS providers such that the market remains competitive and that service quality is assured.³ In particular, if the Commission ultimately decides to adopt an approach other than MARS for IP CTS, it should adopt a price cap approach grounded in a historical IP CTS rate.⁴ A price cap approach, set at a fair starting rate, would be far more likely to encourage a competitive IP CTS market than a cost-based approach that excludes material costs and therefore does not compensate providers for the true cost of providing the service.

Comments of Hamilton Relay, Inc., CG Docket Nos. 13-24 & 03-123 (filed Sept. 7, 2018) (“Hamilton Petition Comments”). Hamilton incorporates by reference its comments made in response to the Sprint petitions. In addition, although the Commission has questioned the continued use of MARS for setting IP CTS rates, there is no ambiguity in the record concerning the continued application of MARS as an economically sound methodology for setting TTY, Speech-to-Speech, and PSTN-based CTS rates. Indeed, Commission staff recently confirmed that MARS is still the appropriate rate methodology to apply for those services.

Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program, Order, DA 18-680, ¶ 5 (CGB rel. June 29, 2018). Hamilton notes that the Commission did not object to MARS as a general proxy to “like services,” only to the use of a MARS rate based on state CTS-rates as a proxy for nationwide IP CTS. *Report and Order*, ¶ 18. To the extent that another suitable competitively-based proxy can be used for IP CTS, the Commission should return to using a competitively-based approach.

³ *Report and Order*, ¶ 3 (observing that Section 255 of the Communications Act, as amended, requires “the Commission to ensure the provision of TRS for persons who are deaf, hard of hearing, deaf-blind, or have speech disabilities that is functionally equivalent to the provision of voice communication services used by persons without disabilities ‘to the extent possible and in the most efficient manner’”) (citation omitted); *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order, 32 FCC Rcd 5891, 5907 ¶ 31 (2017) (noting the competition is likely to “encourage the lowest-cost provider to maintain higher standards of service quality than if it faced no competition”) (“2017 VRS Order”), *aff’d Sorenson Communications v. FCC*, 897 F.3d 214 (D.C. Cir. 2018).

⁴ *See Further Notice*, ¶ 95 (seeking comment on “approaches to IP CTS compensation that can successfully align the rates for this service with actual provider costs and enable the Commission to provide IP CTS in the most efficient manner”).

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A. The Commission Should Adopt a Price Cap Rate Methodology

To the extent that the Commission does not restore the IP CTS rate as Sprint suggests (and Hamilton supports), an alternative approach would be to adopt a price cap model that is grounded in historical IP CTS rates.⁵ The statutory requirement to ensure functionally equivalent voice service to “to the extent possible and in the most efficient manner” must be the Commission’s lodestar.⁶ The DC Circuit Court of Appeals recently affirmed the Commission’s interpretation of “efficient” in this context, allowing the agency to consider long-term efficiencies – including achieving the best quality of service for the cost – and not just short-term savings.⁷ Accordingly, Hamilton urges the Commission to allow space for innovation and competition as it determines a permanent rate methodology. Moving too swiftly to reduce current IP CTS rates would be contrary the Commission’s approach to VRS, and would cripple the IP CTS industry just as it prepares to begin the implementation of ASR with adequate consumer safeguards.⁸

⁵ See *id.* ¶ 95 (seeking comment on “approaches to IP CTS compensation that can successfully align the rates for this service with actual provider costs and enable the Commission to provide IP CTS in the most efficient manner”).

⁶ 47 U.S.C. § 225(b)(1).

⁷ *Sorenson Communications*, 897 F.3d at 227-28.

⁸ In large part due to the nearly 20% reduction in the IP Relay rate from 2012-2013 to 2013-2014, several IP Relay providers exited the market. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, 28 FCC Rcd 9219, 9225 ¶ 20 (CGB 2013) Subsequent, dramatic fluctuations in the IP Relay rate, even to a much higher rate, has resulted in one IP Relay provider remaining in the market. See, e.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, 29 FCC Rcd 8044, 8052 ¶ 19 (CGB 2014) (retroactively increasing the rate to \$1.0309 for two months in 2013, and then to \$1.0607 for the period September 1, 2013 to June 30, 2015); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 29 FCC Rcd 16273, 16278 ¶ 12 (CGB 2014) (increasing the IP Relay rate on an interim basis to \$1.37 for the remainder of the 2014-2015 fund year, but with a separate rate of \$1.67 for any monthly (continued)...

Adopting an appropriate price cap rate could preserve some of the desirable incentives embodied by a market-based rate.⁹ The price cap methodology incentivizes providers to seek out and implement cost savings measures, because providers that do so are able to retain more of their revenue (this is in contrast to a cost-based rate, in which the implementation of cost savings measures would reduce providers' revenue). Price cap rates can also introduce more predictability over a longer period of time than cost-based methodologies. This predictability diminishes idiosyncratic risk, which can reduce the cost of doing business, provided that the Commission avoids the mistakes of the past by limiting the potential for wild fluctuations in the X-factor, as occurred with IP Relay.

With respect to a permanent rate methodology going forward, the Commission should adopt a price cap approach, with an initial starting point of \$1.7630 per minute, which represents the IP CTS rate adopted by the Commission for the 2011-2012 funding year, and the last year in which neither the Commission nor any party to the proceeding challenged the MARS CTS/IP CTS rate as unreasonable.¹⁰ Hamilton believes it would be appropriate for the Commission to properly account for inflation since 2011-2012, thus bringing the \$1.7630 in line with 2018 dollars, but ultimately Hamilton believes that a starting price cap rate between \$1.7630 and one

minutes in excess of 300,000, representing a mid-year increase of anywhere from 32% to 61% in the IP Relay rate).

⁹ See Coleman Bazelon, Patrick Holder, & Brent Lutes, *Economic Analysis of IP CTS Provision Costs and Rate Setting*, The Brattle Group, at 5-12 (Nov. 8, 2017) ("Bazelon Price Cap Analysis") attached to *Ex Parte* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 & 03-123 (filed Nov. 9, 2017).

¹⁰ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Structure and Practices of the Video Relay Service Program*, Order, 26 FCC Rcd 9972, 9979 ¶ 19 (2011).

(continued)...

that fully accounts for inflation is a reasonable approach.¹¹ In any event, the starting point for any price cap rate should be no lower than \$1.7630.

For future fund years, the price cap method adjusts the starting rate over time, increasing the rate for inflation and decreasing it for efficiency in the IP CTS market.¹² Weighing the potential harms of underestimating the appropriate “X-factor” with the potential harms of overestimating the appropriate “X-factor” is important when constructing the “X-factor.” If the subjective beliefs upon which the X-factor is based are not consistent with ex post reality, the X-factor could cause a rate to fall quicker than costs, thus eliminating returns and pushing providers from the market. The primary cost to TRS providers is labor. Consequently, a labor-based inflation adjustment such as the Employment Cost Index is appropriate. The efficiency factor for IP CTS should be based on the telecommunications call center business, which is structurally distinct from the telecommunications industry on whole.¹³ Further, the productivity factor should be near to zero or even slightly negative, as few opportunities exist to increase the number of calls handled per Communications Assistant (“CA”).¹⁴ Any recalibrations should

¹¹ \$1.7630 adjusted using the Consumer Price Index would be \$1.9663 in 2018 dollars. CPI Data from Organization for Economic Co-operation and Development, “Consumer Price Index: Total All Items for the United States,” FRED, Federal Reserve Bank of St. Louis, updated Sept. 5, 2018, <https://fred.stlouisfed.org/series/CPALTT01USQ661S>. A \$1.7630 rate adjusted using the Gross Domestic Product Price Index (“GDPPI”) would be \$1.9822 in 2018 dollars. GDPPI data from U.S. Bureau of Economic Analysis, “Gross Domestic Product: Chain-Type Price Index,” FRED, Federal Reserve Bank of St. Louis, updated Aug. 29, 2018, <https://fred.stlouisfed.org/series/GDPCTPI>.

¹² The net effect of these two adjustments is intended to keep the level of profit constant. The inflation factor is typically variable and linked to a price index. The efficiency factor is often fixed and meant to reflect a subjective belief about future efficiency gains and related costs savings.

¹³ Bazelon Price Cap Analysis at 8 (agreeing that the IP CTS business is more similar to the telecommunications call center business than the telecommunications industry on whole).

¹⁴ *Id.* at 6-7.

(continued)...

take place on a predictable interval and have reasonable limits on the degree and speed at which rates can change in order to maintain provider incentives and market stability.¹⁵ A more comprehensive analysis is provided in the Brattle Price Cap Analysis.¹⁶

B. The Proposed Rate of \$0.49 Per Minute for ASR-only IP CTS Is Flawed and Premature

Although a price cap approach would be appropriate for CA-based IP CTS, the Commission must conduct further analysis of ASR-only IP CTS services prior to adopting an ASR-only rate. Under no circumstances should the Commission adopt the proposed \$0.49 rate for ARS-only minutes of use.¹⁷ As a threshold issue, important questions remain outstanding regarding not only the *method* that ASR-only IP CTS providers might use to comply with the quality, privacy, and other mandatory minimum standards required by the Commission of all IP CTS providers, but also the *cost* of complying with those rules once they are adopted. Even under the inaccurate assumption that current allowed costs provide a useful predictor, there are flaws with the proposed rate that fall into three broad categories: 1) insufficient justification for using the arbitrary 2018-19 IP CTS interim rate of \$1.75 as the starting point for determining the ASR-only rate; 2) the Fund Administrator's unclear categorization of provider costs as "variable" and "fixed;" and 3) the exclusion of intellectual property licensing and development costs from the ASR-only rate calculation.

¹⁵ *Id.* at 10. "The efficiency factor in a price cap rate method is not designed for the abrupt and potentially dramatic change that would result from the sudden elimination of human CAs in the production process; rather, it is designed to account for gradual changes in efficiency." *Id.* Indeed, the Commission should learn from the lessons of the wildly fluctuating IP Relay factor adjustments, which led to a systemic market failure and resulted in the exodus of all but one IP Relay provider.

¹⁶ See generally Brattle Price Cap Analysis at 5-12.

¹⁷ See *Further Notice*, ¶ 98.

(continued)...

1. *Inadequate Justification for 2018-19 IP CTS Rate*

Rolka Loube’s methodology started from an incorrect premise and then compounded its initial mistake with additional errors. Specifically, Rolka Loube’s methodology consists of first determining an “interim cost based rate” of \$1.75 for IP CTS services, which is calculated by reducing the 2017-18 IP CTS rate of \$1.9467 by an arbitrary 10 percent.¹⁸ Rolka Loube then took the average total projected costs of providing IP CTS services for 2018 and 2019, as reported by service providers, of \$1.3223 per minute and disaggregated this figure into what Rolka Loube asserts are “variable” and “fixed” costs.¹⁹ Variable costs were those related to the Captioning Assistant (“CA”) function and include CA Related, Non-CA Relay Center, and Other costs.²⁰ Fixed costs “include all other costs” aside from those related to the CA function and include Facilities, Indirect, Depreciation, Marketing, Outreach, and Return on Investment costs.²¹ Per this categorization of costs, projected average 2018-19 variable costs are \$0.9564 per minute and projected average 2018-19 fixed costs are \$0.3659 per minute.²² To arrive at the proposed ASR IP CTS rate, Rolka Loube calculated the ratio of projected average 2018-19 IP CTS fixed costs to projected average 2018-19 IP CTS total costs and applied this ratio to its proposed 2018-19 interim IP CTS rate of \$1.75.²³ This calculation yielded a proposed ASR rate of \$0.4848 per minute, which Rolka Loube rounded up to \$0.49.²⁴

¹⁸ Rolka Loube Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123, 10-51, at 23 (filed May 4, 2018).

¹⁹ *Id.*

²⁰ CA employment costs for providers that directly employ CAs rather than subcontracting them are included in “CA related” costs, while these costs for providers that subcontract the CA function are reported as “Other.” See *id.* at 21-23 & Exhibit 1-3.

²¹ *Id.* at 23 & Exhibit 1-3.

²² *Id.*

²³ *Id.* at 23-24.

²⁴ *Id.* at 23.

Rolka Loube did not adequately justify its proposal to reduce the 2017-2018 IP CTS rate of \$1.9467 per minute by 10 percent to arrive at its proposed 2018-2019 rate of \$1.75 per minute. Rolka Loube posited that this rate is “above the reported and project costs of the highest cost 2018 provider” and is “substantially above the provider projected average cost for 2018-2019 of only \$1.3214 per minute.” Even assuming the other data was correct, this rate was calculated after improperly excluding CaptionCall’s licensing costs, as well as indirect overhead costs, research and development costs, equipment, and taxes, which causes Rolka Loube to substantially underestimate average provision costs.

Further, Rolka Loube notes that its approach “is consistent with the phased transition approach taken by the Commission in the Video Relay Service (“VRS”) ratemaking proceeding while ensuring that the costs of even the highest cost provider are met.” Nevertheless, the 10 percent incremental reduction applied to VRS rates was itself arbitrary. It is inappropriate to justify the current arbitrary rate reduction with a prior arbitrary rate reduction.

2. *Opaque Categorization of “Variable” and “Fixed” Costs*

Rolka Loube’s categorization of certain costs as fixed and variable was opaque. First, Rolka Loube defined variable costs as those related to the “CA function” but treats “Non-CA Relay Center” expenses as variable costs without explaining how those costs could be avoided by the use of ASR.²⁵ Per Rolka Loube’s 2017 Annual State Rate Data Request Filing Instructions, these expenses include salaries and benefits for relay center management and staff, telecommunications expenses, billing expenses, and relay center expenses.²⁶ Additionally, Rolka Loube treated “Other” costs as variable costs. While this treatment is reasonable to the

²⁵ *Id.* at Exhibit 1-3.

²⁶ *Id.* at App. B “Interstate TRS Fund Annual Provider Information,” at “IP CTS Services Expense and Capital Investments Data.”
(continued)...

extent that CA subcontractor expenses are included in this cost category,²⁷ there are other costs that appear to be included in “Other,” such as software, customer distributed equipment, and other expenses, that do not appear to be related to the “CA function.”²⁸

It is possible that these costs have been re-categorized for the purpose of Exhibit 1-3 (and by extension, for the ASR rate calculation), but there is no discussion of any such re-categorization in Rolka Loube’s 2018 annual report, nor is there any visibility into Rolka Loube’s accounting. If some of these costs were, in fact, included in variable costs, Rolka Loube provided no analysis or justification as to why these costs would be completely eliminated when providing exclusively ASR-based IP CTS.

In addition, Rolka Loube merely points to costs that it believes might be circumvented through the use of ASR-only service; it failed to recognize, however, that the provision of such service may entail costs that are not currently incurred. For example, software maintenance and related customer service fees may be higher for an ASR-only service to address issues that arise in the application of user-facing ASR. Similarly, the higher reliance on nascent technology would likely necessitate increased research and development spending. Ultimately, Rolka Loube only considered the gross reduction in CA costs and ignored the net effect that implementing ASR-only service would have on providers’ costs.

²⁷ *Id.* at 21, 23.

²⁸ *Id.* at App. B “Interstate TRS Fund Annual Provider Information,” at “IP CTS Services Expense and Capital Investments Data.” Marketing/Advertising Expenses and Outreach Expenses are also included in “Other TRS Expenses” per Rolka Loube’s filing instructions, but these costs are separately broken out in Exhibit 1-3.
(continued)...

3. *Rolka Loube's Calculations Inappropriately Exclude Intellectual Property Licensing and Development Costs*

In previous Commission proceedings regarding the provision of VRS, one provider claimed that it should be compensated by the TRS Fund for the value of its intellectual property used in providing relay services.²⁹ Although the Commission rejected this proposal, Rolka Loube requested that the provider submit its IP CTS costs both with and without intellectual property costs.³⁰ Rolka Loube excluded these fees and expenses from its recommendations for IP CTS and consequently excludes them from its calculation of a proposed ASR-only IP CTS rate.³¹ From an economic and an accounting perspective, proper and reasonable licensing and development costs should be appropriately included as a reimbursable cost, even if those costs are paid to an associated entity.

Per Rolka Loube's definitions of "variable" and "fixed" costs, intellectual property expenses would be treated as fixed costs, as they do not relate directly to the CA function. The exclusion of licensing and development costs from Rolka Loube's calculation inappropriately reduces IP CTS providers' fixed costs and consequently reduces the ratio of fixed costs to total costs that was used to determine the proposed ASR-only rate. However, even a rate that includes these costs may not accurately account for all costs associated with providing ASR-only services, because the Commission must first determine the quality and other standards that will apply to the service in order to ensure its functional equivalency.

²⁹ *Id.* at 21.

³⁰ *Id.*

³¹ *Id.*

C. The Commission Should Refrain from Adopting a Cost-Based Compensation Methodology

In all events, the Commission should not adopt a cost-based compensation method, especially one based on a materially flawed view of reasonable and allowable costs. Excluding legitimate costs of service, as the Commission has done with respect to other TRS services, and as demonstrated by the misaligned cost categories the TRS Fund Administrator has used to collect information from TRS providers generally, necessarily sets the rate too low to compensate providers for the actual costs incurred in the provision of service.³² In addition, the different cost compensation methodologies available, such as setting a rate at the weighted industry average and the cost of the marginal provider, ultimately will lead to market exit by competitors, thus harming consumer choice.³³

³² See, e.g., Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123, 10-51 at 15 (filed May 24, 2017) (noting that because the FCC has never determined what costs are reasonable or allowable in connection with IP CTS, there are almost certainly wide disparities in the various approaches that IP CTS providers take in submitting their costs, among other flaws with the cost collection method used by the TRS Fund Administrator).

³³ If IP CTS is reimbursed at the average provider cost, it is possible to reduce the market to a single provider. This is because the low-cost provider is also the largest provider, and the remaining providers have similar costs to one another. To illustrate this point, assume that the low-cost provider has 50% of the market and the remaining four providers have 50% of the market. Further assume that the cost incurred by the low-cost provider is C_1 , and the remaining five providers all have a higher cost of C_2 . It is straightforward to recognize that the average cost will be halfway between C_1 and C_2 , which is necessarily more than the low-cost provider's cost and necessarily less than the costs incurred by *all* other providers. If this were the reimbursement rate, all but the low-cost provider would be forced to exit the market, leaving the low-cost provider to capture the entire market and be reimbursed for doing so at a rate that is necessarily in excess of its costs. So long as there is some difference between the larger, low-cost provider and the other providers, this negative cycle of losing the highest cost providers will develop. See, e.g., Coleman Bazelon and Brent Lutes, "Telecommunications Relay Services for Individuals who are Deaf or Hard of Hearing, Market and Policy Analyses" The Brattle Group, Aug. 30, 2017, at 30-32 ("Brattle August 2017 Report") (analyzing the potential effect of adopting cost-based rate methodologies for IP CTS providers based on the current market, i.e., with the lowest cost provider simultaneously being the largest provider), *attached to Ex Parte* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, CG Docket Nos. 13-24, 03-123 (filed Sept. 7, 2017).

Even if the Commission properly characterized IP CTS costs so that providers were compensated for actual costs, by linking reimbursement rates to costs, the Commission may realize short-term cost savings to the TRS Fund, but it is doing so at the expense of the TRS Fund's long-term health and sustainability. Specifically, providers will no longer have the incentive or the means by which to engage in cost-saving innovation. Linking reimbursement to costs disincentivizes providers from engaging in costly research and development in order to reduce costs, even in the face of multi-year rates. That is, a cost-based rate methodology perversely leads to a reduced incentive to control costs. It is for this reason that the Commission has moved away from cost-based methodologies generally.

Further, when reimbursement is linked to costs, providers' future returns will decrease if they decrease costs. Hence, the decision faced by providers will be either 1) take the socially optimal level of action to reduce expenses and realize increased margins for the contemporaneous rate period, but decrease the level of returns in all future rate periods; or 2) take no action, accept the margins in the contemporaneous period, and maintain higher returns for future periods. In actuality, the decision will likely land somewhere in between the two options with providers willing to reduce costs to some extent, but not to the full extent they could under a better aligned set of incentives. The Commission has proposed using multi-year rates to prevent this problem. However, while multi-year rates may shift the calculus slightly, they do not fully realign incentives. For example, instead of facing the decision of increased margins for one year at the expense of a perpetual reduction in returns, providers would need to consider increased margins in, say, two years (or whatever the rate period is) at the expense of the same perpetual reduction in future returns.

Ultimately, using costs to set rates, even if those costs were correctly and appropriately tabulated, results in misaligned incentives for providers. Because these incentives exist, the Commission's choice to employ a cost-based rate can be fundamentally distilled to a tradeoff between the short-term benefit of lower costs now versus the expense of higher costs later.

II. Any Cost-Based Approach to Compensating IP CTS Providers Must Account for All Legitimate Costs of Providing IP CTS, Including Those Outlined Under Part 32

To the extent the Commission nonetheless decides to use a cost-based approach to IP CTS compensation, such a methodology must properly account for all legitimate and reasonable costs IP CTS providers incur when providing service. Indeed, the Commission should ensure it does not repeat the mistakes of the rate cuts set forth in the *Report and Order*, which were based on flawed cost data from the TRS Fund Administrator that failed to account for all legitimate costs of providing the service – let alone important service quality issues.³⁴ Affirmatively excluding legitimate costs could both decrease service quality and lead providers to exit the market.

The Commission's Part 32 rules provide a useful, long-standing guide for determining costs, and the Commission should expressly allow several cost categories currently recognized in Part 32 but currently excluded from the TRS Fund Administrator's IP CTS cost reports.³⁵ Part 32 prescribes the Uniform System of Accounts for telecommunications companies and outlines the revenues, costs, and other financial information that telecommunications firms must submit to the Commission.³⁶ Although Commission rules indicate that costs outlined under Part 32

³⁴ See, e.g., Hamilton Petition Comments.

³⁵ See *Further Notice*, ¶ 72 (seeking comment on the reasonableness of costs currently reported by IP CTS providers).

³⁶ 47 C.F.R. Part 32.

(continued)...

should be among the data provided to the TRS Fund administrator for potential reimbursement,³⁷ certain cost categories that are included in Part 32 are excluded from the data collection forms used by the TRS Fund Administrator, which have been relied upon to calculate cost-based IP CTS rates.³⁸ These costs are considered “not reasonable costs of providing TRS” or are otherwise “not compensable” by the Fund according to the filing instructions drafted by Rolka Loube. These exclusions in the filing instructions reflect that these are not “allowable cost categories,” as determined by the FCC.³⁹ For example, costs attributable to a TRS customer’s relay hardware and software, including installation, maintenance, and testing, are not compensable by the TRS Fund because these costs are not considered “part of a provider’s expenses in making relay *services* available.”⁴⁰ Specifically, the following are excluded from ultimate submission to the Commission even though they appear in Part 32: (i) non-IP CTS costs; (ii) indirect overhead costs; (iii) research and development beyond that required “to meet the non-waived mandatory minimum standards”; (iv) relay hardware and software used by the consumer, including installation, maintenance costs, and testing; and (v) income taxes. The Commission has never explained why these legitimate cost categories under Part 32 are disallowed for IP CTS.

While most of the excluded costs are clearly included in Part 32, many would be further categorized specifically as TRS investment, consistent with the language of the TRS rules.⁴¹ In particular, research and development is typically thought of as an investment from an economic

³⁷ 47 C.F.R. § 64.604(c)(5)(iii)(D)(1).

³⁸ See, e.g., Interstate TRS Fund, 2017 Annual TRS Provider Data Request Filing Instructions, at 2-3, Rolka Loube (Jan. 2018).

³⁹ See, e.g., *id.*; 2017 VRS Order, ¶¶ 10-12.

⁴⁰ 2017 VRS Order, ¶ 12.

⁴¹ 47 C.F.R. § 64.604(c)(5)(iii)(D).

perspective. Additionally, customer equipment would be economically categorized as a physical capital investment. Likewise, marketing may be thought of as an investment insofar as such efforts are intended to affect a long run revenue stream. In sum, both general expenditures and investments appear to be disallowed from TRS cost submissions, despite being described in Part 32. Accordingly, the Commission should expressly recognize these costs as the reasonable costs of providing IP CTS service.

Hamilton notes that it is premature to obtain additional cost data until the Commission actually decides to adopt a cost-based rate methodology, as compared to alternative methodologies, such as a price cap. But to the extent that the Commission adopts a cost-based methodology, it should ensure that it is capturing all legitimate costs. In addition, it would be premature to adopt any new audit requirements because the Commission has already adopted new IP CTS data collection and audit rules that have yet to become effective.⁴² At a minimum, the Commission should allow those rules to become fully effective so that it can evaluate the efficacy of those rules before adopting potentially duplicative or unnecessary new rules in this rulemaking.

III. Hearing Health Professionals Are Best Positioned to Determine the Communications Needs of Hard of Hearing Individuals

Below, Hamilton explains its support for the recent comments of the American Academy of Audiology (“AAA”), which argue that a hearing health professional’s expert ability to combine information from objective assessments, patient reports, and clinical observations is an

⁴² *Report and Order*, ¶¶ 36-37. The Commission recently sought comment on these new requirements on August 29, 2018. 83 Fed. Reg. 44,049. They will not become effective until after approval by the Office of Management and Budget. 83 Fed. Reg. 30,082. (continued)...

appropriate approach to authorizing the use of IP CTS, and is consistent with the original intent of the Communications Act.⁴³

A. *The Commission Has Not Produced Evidence of General IP CTS Fraud, Waste or Abuse*

As an initial matter, however, Hamilton continues to object to the Commission's contention throughout the *Report and Order* and *Further Notice* that there is general waste and misuse in the IP CTS industry, rather than isolated incidents due to questionable marketing practices of some providers.⁴⁴ As the DC Circuit Court of Appeals noted, the Commission has not produced any evidence suggesting there is any fraud to deter in the IP CTS industry.⁴⁵ Nor is there any evidence of IP CTS abuse by either providers generally or end users.⁴⁶ Hamilton has previously submitted independent data into the record showing that IP CTS growth is being caused by recognizable demographic shifts related to an aging population. Notably, the over-65 population increased by 17.5% between 2008 and 2016.⁴⁷ These figures show that the growth in

⁴³ Comments of the American Academy of Audiology, at 3 (filed Sept. 7, 2018) ("AAA Comments").

⁴⁴ For example, the Commission suggests there is "potential waste" (*Report and Order* ¶ 1), or "incentives that appear likely to cause excessive waste in the IP CTS program—in part resulting from questionable provider practices" (*Id.* ¶ 7). Given the lack of any evidence of general IP CTS misuse in the record, Hamilton encourages the Commission to initiate a new IP CTS docket with a docket name that better reflects the Commission's statutory mandate to accommodate individuals with hearing and speech disabilities, and that removes any reference to misuse. The Commission should of course enforce its existing rules to the extent that it finds any specific evidence of IP CTS misuse by providers or users.

⁴⁵ *Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

⁴⁶ The *Further Notice* relies almost exclusively on anecdotal hearsay evidence submitted by one commenter. See *Further Notice* n. 32.

⁴⁷ Brattle August 2017 Report, at 19.

(continued)...

IP CTS is much more likely due to the increasing pool of legitimate users and not to misuse of the service.⁴⁸

The Commission, in contrast, engages in speculation rather than substantive data when it suggests that if, in the future, 10 percent of the IP CTS usage generated by new users results from registration of users who do not need IP CTS, then improved screening is estimated to save the Fund, in the first year, \$14.2 million.⁴⁹ The Commission further speculates that if, in the future, 20 percent of the IP CTS usage generated by new users results from registration of users who do not need IP CTS, then improved screening is estimated to save the Fund, in the first year, \$28.4 million, simply by doubling the math in the previous example.⁵⁰ It is equally likely, however, based on the record and using the same mathematical approach, that if, in the future, 0.0005 percent of the IP CTS usage generated by new users results from registration of users who do not need IP CTS, then improved screening is estimated to save the Fund, in the first year, \$711.00. The figures being relied upon in the *Further Notice* are simply speculative and not the product of rational rulemaking. They certainly do not provide evidence of purported misuse of IP CTS. Thus, while Hamilton supports the Commission's efforts to improve the screening process, it would be disingenuous to suggest that existing users do not need IP CTS, or that arbitrary percentages of future users will not need the service either. If regulatory changes are going to be proposed based on claims of misuse of the service, the misuse should be substantiated by empirical evidence rather than anecdotal references to certain incidents of misuse. And the Commission should be using its enforcement tools first to target the misuse,

⁴⁸ See Comments of the American Speech-Language-Hearing Association, CG Docket Nos. 03-123, 13-24, at 2 (filed Sept. 14, 2018).

⁴⁹ *Further Notice*, ¶ 137.

⁵⁰ *Id.*

rather than adopting rules of general applicability that have not been subjected to a cost-benefit analysis.

Moreover, the Commission has, under its existing rules, performed numerous audits of Hamilton and presumably other providers over the past five years. Hamilton has passed each of those audits without any material issue (and Hamilton welcomes those audits to ensure the integrity of the TRS Fund). Hamilton's performance in these audits suggests that it is already taking appropriate steps to combat any perceived fraud, waste or abuse of IP CTS.

In addition to these audits, Hamilton also provides monthly Call Detail Records ("CDRs") to the Fund Administrator, as do all other IP CTS providers. Those CDRs could be used to identify any anomalous behavior and take corrective action where necessary.

Finally, Hamilton takes a number of steps to deter unlawful use or waste of IP CTS, including additional user verification methods, the continued voluntary use of third party certifications, and CA training to identify and halt misuse. Those methods have been confidentially explained in detail to the Fund Administrator and the Commission.

In short, to fundamentally alter a system that has brought functionally equivalent communications services to tens of thousands of eligible users because of isolated evidence of waste or misuse would be arbitrary and severely injure the users who benefit from the program. To be sure, all stakeholders, including Hamilton, support reasonable Commission efforts to deter fraud, waste, and abuse, but the Commission must specifically identify those incidents and take targeted action to remove the problem, rather than adopting sweeping industry changes that harm legitimate providers and users, and which may not actually remove the problem.

B. Hamilton Joins AAA in Supporting the Use of Independent Third Party Assessments

As noted above, since 2014 Hamilton has continued, on a voluntary basis, to obtain third party certifications from individuals who do not purchase a device before permitting them to use IP CTS. Hamilton agrees with AAA that the Commission should permit IP CTS users to demonstrate their eligibility for the service through the use of independent third party certifications by hearing health professionals. In order to avoid burdening consumers, individuals who have already obtained such certification should be grandfathered, and not required to obtain a new certification under any revised certification rules adopted by the Commission in this proceeding.

Hamilton agrees with AAA that audiologists have been effective in screening users, and should continue to be involved in certifying users based on their professional expertise:

[G]iven the complex nature of the factors affecting phone communication and in the absence of meaningful real-world criteria, it would be too restrictive to exclusively depend on metrics of hearing loss and speech understanding in such assessments. [AAA] strongly suggests deferring to the audiologist's expertise in the considerations for IP CTS authorization and also recommends that all third-party professionals document the basis on which authorizations are made.⁵¹

Hamilton also agrees with AAA that such an approach is in the best interest of individuals with hearing impairment:

[R]emoving audiologists' ability to authorize IP CTS creates unnecessary burden for the already-vulnerable person with hearing impairment who may decide to forego the added hassle of treatment in favor of convenience. Although this translates to decreased utilization of IP CTS, the action is contrary to the spirit of the Communications Act...[I]t is in the best interest of individuals with hearing impairment that the FCC continue to allow audiologists to authorize use of IP CTS.⁵²

⁵¹ AAA Comments, at 4.

⁵² *Id.* Notably, AAA indicates that its audiologist members' assessments are objective and accurate. *Id.* at 2-3. This contrasts with the Commission's suggestion that improvements are needed to the objectivity and accuracy of third party certifications. *Further Notice* ¶ 129.

In addition to audiologists, the Commission has proposed that providers could accept certifications signed by physicians specializing in otolaryngology and other state certified or licensed hearing health professionals qualified to evaluate an individual's hearing loss in accordance with applicable professional standards.⁵³ Hamilton agrees with this proposal, and requests that the Commission specifically find that General Practitioners should also be included (given that many individuals' insurance may not cover a specialist but would cover a General Practitioner), provided they are qualified to evaluate an individual's hearing loss in accordance with applicable professional standards. In addition, veterans particularly rely on Veteran Service Officers ("VSOs") for certifying hearing loss. The Commission should affirmatively find that VSOs are qualified to issue third party certifications. Registered Nurses and physician assistants should also be permitted to issue third party certifications, provided they are qualified to evaluate an individual's hearing loss in accordance with applicable professional standards. Finally, the Commission should retain its existing third party professional rules, as proposed in Appendix C of the *Further Notice*.⁵⁴

Hamilton also believes it is important to give consumers the flexibility to demonstrate eligibility through other means. For example, Hamilton continues to believe that users should be given the option to pay \$75 or more for the IP CTS phone and to self-certify without the need for a third party certification. As the Commission has previously found, a user's willingness to spend money to purchase a phone offers strong evidence that the user's need is legitimate.⁵⁵

⁵³ *Further Notice*, ¶ 130.

⁵⁴ See 47 C.F.R. § 64.604(c)(9)(viii)(A); *id.* § 64.604(c)(9)(ix). For clarity, subsections (v) and (vi) of Section 64.604(c)(9) should be amended to "[Reserved]" because they apply to the period prior to August 28, 2014.

⁵⁵ *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, (continued)...

Although the DC Circuit did not permit the Commission to *require* the payment of \$75 or more, the court did not prohibit the Commission from allowing users to select this method for demonstrating a need for the service. In short, the court’s decision did not disturb the Commission’s policy rationale that “where consumers must make an investment in an IP CTS equipment purchase, they are far less likely to acquire such equipment if they do not need the service.”⁵⁶

C. Proposed Changes to Section 64.604(c)(8) Are Overly Broad

The *Further Notice* proposes to expand the restrictions set forth in Section 64.604(c)(8) of the rules to prohibit incentives to “any other person or entity.”⁵⁷ While Hamilton supports the Commission’s efforts to end harmful marketing practices, Hamilton is also concerned that the proposed changes to that provision are overly broad. This language conceivably would include payroll payments to a provider’s employee payroll, payments to independent contractors by providers, subcontractor employee payrolls, and other legitimate financial compensation to individuals and entities, that are not inherently unlawful incentives. Additionally, the proposed language conceivably would preclude a legitimate user from purchasing an IP CTS phone for \$75 if the cost of the phone exceeded that amount. As an alternative approach, Hamilton encourages the Commission to employ the language used in Paragraph 143 of the *Further Notice*, in order to address the specific concern raised by the Commission in that paragraph. Accordingly, revised Section 64.604(c)(8)(1) would provide as follows:

Report and Order and Notice of Proposed Rulemaking, 28 FCC Rcd 13420, ¶ 41 (2013) (“*Permanent IP CTS Order*”); *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703, ¶ 23, n.71 (2013) (subsequent history omitted).

⁵⁶ *Permanent IP CTS Order*, ¶ 41 (citation omitted).

⁵⁷ *Further Notice*, App. C.

(ii) An IP CTS provider shall not offer or provide to a hearing health professional, professional caregiver or other professional who provides services to senior citizens or other users of IP CTS any direct or indirect incentives, financial or otherwise, to encourage referrals of potential users, registrations, or use of IP CTS. Where an IP CTS provider offers or provides IP CTS equipment, directly or indirectly, to a hearing health professional, professional caregiver or other professional who provides services to senior citizens or other users of IP CTS, and such person or entity makes or has the opportunity to make a profit on the sale of the equipment to consumers, such IP CTS provider shall be deemed to be offering or providing a form of incentive to encourage referrals of potential users, registrations or use of IP CTS.

D. Proposed Changes to Section 64.604(c)(10) Should Be Clarified

The *Further Notice* includes a proposal to modify Section 64.604(c)(10) in order to add the following provision:

(ii) The device shall not include any features that have the foreseeable effect of encouraging IP CTS users to turn on captions when they are not needed for effective communication.

Hamilton supports the inclusion of this concept in the rules, but is concerned that the proposed language is not sufficiently clear as to the reasonable foreseeability of a particular device feature's effect. Hamilton suggests that a potentially clearer rule would provide as follows:

(ii) The device shall not include any features that an IP CTS provider knows or has reason to know will have the effect of encouraging IP CTS users to turn on captions when they are not needed for effective communication.

This language is consistent with the language adopted by the Commission in new Section 64.604(c)(13)(ii).⁵⁸

⁵⁸ *Report and Order*, App. B.

E. The Commission Should Allow Rules Adopted in the Report and Order to Take Effect Before Adopting More Rules

Finally, Hamilton notes that certain of the rules adopted in the *Report and Order* have not gone into effect yet, because they require prior approval of the Office of Management and Budget. These rules include new IP CTS device configuration requirements, marketing restrictions, and general rules prohibiting the unauthorized or unnecessary use of IP CTS. Hamilton believes that is important for the Commission to allow those rules to go into effect, and for the Commission to measure their effectiveness, before adopting the additional rules proposed in the *Further Notice*, in order to avoid over-regulation of the industry, stifling of innovation, and the addition of unnecessary burdens to consumers.

IV. Conclusion

Hamilton urges the Commission to adopt a rate methodology other than a cost-based methodology – an approach that became problematic more than 10 years ago and led to the adoption of MARS. To the extent that the Commission declines to retain MARS as Sprint has suggested, the Commission should adopt a price cap approach as outlined in the Brattle report. To the extent that the Commission nonetheless decides to adopt a cost-based approach, it must be based on sound data, including Part 32 costs, and must adequately reimburse IP CTS providers for all legitimate costs incurred in the provision of IP CTS.

Whatever methodology the Commission adopts, it must foster both competition and service quality while building the framework for a compensation methodology for ASR once ASR becomes a viable substitute for Communications Assistant-based IP CTS. The

Commission must seek further comment on ASR issues and modify existing rules to incorporate ASR before adopting an appropriate compensation method.

Finally, Hamilton believes that hearing health professionals are best positioned to determine the communications needs of hard of hearing individuals through an independent third party assessment approach. Hamilton supports the Commission's proposed rules in Appendix C of the *Further Notice*, with the modifications suggested in these comments.

Respectfully submitted,

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